

Binod Kumar Gautam v Commission for the Investigation of Abuse of Authority¹

Nepal Kanoon Patrika 2079, Decision Number 10808

Supreme Court of Nepal,

Full Bench

Hon'ble Justice Ananda Mohan Bhattarai

Hon'ble Justice Anil Kumar Sinha

Hon'ble Justice Bam Kumar Shrestha

Facts of the Case:

(Author of the decision, Bhattarai J)

The petitioner was working as a civil servant in the position of Under-Secretary before being appointed as a district judge. He had to provide an opinion on a government-owned-land related procedural matter presented before his department. Later, the land in issue was found to have traces of embezzlement by authorities involved. A case was initiated by the Commission for the Investigation of Abuse of Authority's (hereinafter referred to as CIAA), and charge sheet was filed against him and others. But by the time investigation on the matter was initiated by the CIAA the petitioner had been already appointed as a district judge by the Judicial Council.

The issue in contention is whether or not a case can be filed against a person holding the position of Judge on a matter that he is alleged to have been involved in when he was holding another position. In this, the petitioner has just forwarded a departmental memo pinioning that the matter should be decided by the Cabinet.

Article 239 of the Constitution of Nepal in Article 239(1) empowers CIAA to investigate matters pertaining to corruption by public officials by abusing their official position. However, the same article provides that where separate provisions have been made by the Constitution or the law in case of officials such matters this provision shall not be applicable.

The petitioner claims that in the present case, there is a change in the person's official status. The petitioner was in the Civil Service when he gave his opinion. He is being charged now while he currently holds the position of a Judge. Given the change in position and the present status of law, the Constitution has made it clear that separate laws should be drawn in his case arguing that the CIAA does not have jurisdiction to file a charge sheet against him without the prior permission Judicial Council under Art 253 of the Constitution.

¹ Cited as: Binod Kumar Gautam v Commission for the Investigation of Abuse of Authority, Decision Date: 24 February 2022, NKP 2079, Vol 64, Baisakh, Issue 1, Decision Number 10808 . The writ petition was initially rejected by the single bench of the SC, however, it was reviewed by the Full Bench as per the section 11 of the Judicial Administration Act. Hence the matter was heard by the Full bench of the Court.

Ratio:

Judicial independence includes the structural independence of the judiciary, functional autonomy in judicial work, appointing judges, tenure and certainty in service facilities, and immunity from being dismissed from service on grounds other than the grounds and procedures determined by the Constitution and law.

The Constitution and the Judicial Council Act of 2073 do not grant immunity to the Judge from investigation and prosecution for crimes committed before appointment to the post of Judge. The Constitution and the law have laid down different process of inquiry and action on such matters. In a case where the matter is placed under the jurisdiction of the Council, it only provides protection from the direct intervention of the Executive without granting immunity from the offense. If corruption appears to have been committed, where evidence is present and the case is not barred by the statute of limitation; upon investigation into the corruption charge, if the person being investigated is found to fall within the scope of Judicial Council's jurisdiction, written communication regarding the same should be sent by the investigating body to the Council.

Considering that the work done by the writ petitioner, in this case, was before he was appointed as a Judge in a suit against corruption charges against a Judge, it is incumbent on the Justice Council to decide whether the matter is within its jurisdiction. Even when assuming that the offense does not fall within its jurisdiction, it would be in accordance with the Constitution and the law that the body having prima facie jurisdiction decided if it can see or has jurisdiction under a particular matter.

Court's Ruling:

It is not the intention of the Constitution to use the concept of an independent judiciary as a protective shield to protect the Judge from any act or offense committed by him. Given that independent judiciary is the foundation of the separation of powers, the rule of law, and democracy, independence should be ensured through the Constitution and the law. The Judge should not be released from office without completing procedure prescribed by the law. The established standards of judicial conduct also respect the concept of independent judiciary.

The Constitution of Nepal and the Council of Justice Act, 2073 do not exempt the Judge from being investigated and prosecuted for crimes committed before he was appointed to the post of Judge. Instead, when studying these provisions in their totality, it appears that the Constitution and the law have only made a difference in how such matters can be investigated and acted upon. The respondent, CIAA, does not deny that the corruption investigation had started before the writ petitioner was appointed to the post of Judge.

According to Article 239(4) of the Constitution, if a person being investigated under the charge of corruption is found to be the person who falls under the scope to be investigated by the Judicial Council, the CIAA cannot press or file a chargesheet against the person. Instead, the investigating body should send a written report to the Judicial Council. The Judicial Council has the authority to

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act against any matter brought upon the writ petitioner, who works as a District Judge. In this case, it is not evident that CIAA has had any correspondence, received consent, or given any information to the Judicial Council.

In this situation, the action of the respondent CIAA to investigate, prosecute the petitioner, and inform the Judicial Council of the suspension of the writ petitioner is deemed unfavorable to the principle of separation of powers and independent judiciary along with the Constitution of Nepal and the Judicial Council Act, 2073. Hence, an order of certiorari issued to quash the case filed against the petitioner in the Special Court, Kathmandu, and the letter provided to the Judicial Council informing the same².

² The petitioner is reinstated to the post of district judge.